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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

MICHAEL BUCKLEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

CRAIG A. BERRINGTON
LAURA L. KERSEY
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 828-7100

KENNETH W. STARR
Counsel of Record
PAUL D. CLEMENT
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, NW
Suite 1200
Washington, DC 20005
(202) 879-5000

Counsel for *Amicus Curiae* American Insurance Association

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INTEREST OF *AMICUS CURIAE*

The American Insurance Association ("AIA") is a national trade association representing more than 250 companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA member companies are affiliated with 79,000 independent insurance agents nationwide. The purposes of AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains seven regional offices, and retains legislative counsel in every state.

In this case, AIA believes that the United States Court of Appeals for the Second Circuit erred by upholding a cause of action for negligent infliction of emotional distress in the absence of any showing of physical or emotional injury. Respondent's cause of action is contrary to sound public policy and would jeopardize both the judicial system and the insurance industry in their common goal of compensating those who are actually injured. AIA also believes that the Second Circuit incorrectly ruled that the respondent could recover for the costs of future medical monitoring. For these reasons, AIA appears as amicus curiae to urge this Court to reverse the decision of the Second Circuit to permit respondent to recover damages for negligent infliction of emotional distress and the costs of future medical monitoring.

SUMMARY OF ARGUMENT

In *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994), this Court established that plaintiffs could bring actions for negligent infliction of emotional distress under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, only if they satisfied the common law zone of danger test. In other words, to recover for negligently-inflicted emotional injury, a

plaintiff either had to suffer an actual physical injury or at least be "placed in immediate risk of physical harm." *Gottshall*, 114 S. Ct. at 2406. Despite the clear teaching of *Gottshall*, the Second Circuit allowed respondent to pursue his claims of emotional injury even though he had never suffered a physical injury and was never in danger of suffering any immediate physical injury. The Court of Appeals reached this result by ignoring the requirement -- implicit in the zone of danger test and the other common law rules considered in *Gottshall* -- that in order to recover, the plaintiff must have been in danger of suffering either a direct hit or a near miss from some imminent threat. In so doing, the Court of Appeals created a regime in which exposure to a hazardous substance alone can give rise to claims for emotional injury. That decision has the effect of creating new torts for "fear of cancer" and "medical monitoring," and expands liability for negligently-inflicted injury well beyond the limits carefully crafted by this Court in *Gottshall*. This Court should reaffirm *Gottshall* and reverse the Second Circuit's ruling.

ARGUMENT

I. RESPONDENT DOES NOT HAVE A VALID CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

A. Respondent Does Not Have a Cause of Action Under *Gottshall* Because He Never Suffered Any Injury Nor Was He Ever Placed in Imminent Danger of Any Immediate Physical Injury.

In *Gottshall*, this Court traced the development of the law of negligent infliction of emotional distress from an absolute requirement of physical injury to modern expansive notions of liability like the bystander rule. The history of the tort underscores one requirement that has been constant over time and across jurisdictions: the plaintiff or his proxy must be placed in an imminent and immediate physical danger that gives rise to fright and emotional distress. Rather than allow

recovery for all varieties of emotional injury, courts have permitted recovery only for fright and emotional distress caused by either an actual physical injury or, as this Court put it in *Gottshall*, "a near miss." In this case, respondent never was put in any danger of immediate injury. Instead, he seeks to recover for the anxiety associated with a future event that may never occur -- the possibility that he may contract cancer. There is no basis for such a recovery under *Gottshall*: Without some imminent and immediate danger, *Gottshall* and its zone of danger rule do not impose liability.

1. The Zone of Danger Test Adopted by This Court in *Gottshall* Requires Proof of an Imminent Danger of Immediate Physical Injury.

The historical evolution of the tort of negligent infliction of emotional distress confirms that courts consistently have limited recovery to those situations in which the plaintiff either suffered an immediate physical injury or was placed in danger of suffering an immediate physical injury. Originally, a plaintiff could recover for emotional injuries only if he also suffered physical injuries. Without an actual physical injury from the traumatic event, no recovery would lie. *See, e.g.*, *Victorian Rwys. Comm'rs v. Coultas*, 13 App. Cas. 222 (P.C. 1888); *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896); *Spade v. Lynn & B.R. Co.*, 168 Mass. 285, 47 N.E. 88 (1897); *see also Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo. 1983) (*en banc*) (explaining that under the traditional rule there was no recovery "unless the plaintiff suffered a contemporaneous traumatic physical injury"). In other words, although emotional distress could provide an additional element of damages for another tort involving a distinct physical injury, it was not an independent basis for liability.

Although some courts relaxed the requirement of physical injury and began to talk more loosely about the requirement of "physical impact," they continued to require a threat of imminent and immediate physical injury. What was relaxed

was the extent of the physical injury actually suffered, but the threat of an immediate and grave injury remained essential. *See, e.g.*, *Simmons v. Pacor, Inc.*, 543 Pa. 664, 677, 674 A.2d 232, 238 (1996) ("Those cases which base recovery upon an 'impact' rather than injury involve plaintiffs who have witnessed a traumatic physical injury . . . ."); *Grube v. Union Pac. R.R. Co.*, 256 Kan. 519, 526, 886 P.2d 845, 850-51 (1994) (denying recovery despite allegation of impact because alleged emotional distress did not result from fear of imminent danger to plaintiff's safety). Under these cases, an individual who escaped the full brunt of a threatened imminent injury, but nonetheless experienced some physical impact from the cause of the physical danger, could bring a cause of action for fright and emotional distress.

At the same time that some courts began to recognize increasingly trivial physical impacts as sufficient to allow recovery, others rejected the physical impact rule as an arbitrary limitation on liability and adopted the zone of danger test. Both the willingness to recognize trivial physical impacts as sufficient and the adoption of the zone of danger test reflected the reality that "'a near miss may be as frightening as a direct hit.'" *Gottshall*, 114 S. Ct. at 2406 (*quoting* Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm – A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 488 (1982)); *see also Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994) (observing that both the stretching of the definition of physical impact and the adoption of the zone of danger test reflected the same impulse). Importantly, under the zone of danger test, as in cases of physical impact short of injury, the relevant near miss is a near miss of imminent harm.[1] The zone of danger

[1] As the Minnesota Supreme Court recently explained:

> [C]ases permitting recovery for negligent infliction of emotional distress are characterized by a reasonable anxiety arising in the plaintiff, with attendant physical manifestation, from being in a situation where it was abundantly clear that plaintiff was in grave personal peril for some specifically defined period of time.

K.A.C. v. Benson, 527 N.W.2d 553, 558 (Minn. 1995).

test, as its name implies, requires that the plaintiff be "placed in immediate risk of physical harm" by the defendant's negligent conduct. *Gottshall*, 114 S. Ct. at 2406; *see also Gaston v. Flowers Transp.*, 866 F.2d 816, 820 (5th Cir. 1989) (denying recovery under zone of danger test because plaintiff never feared imminent threat to his safety); *Garcia v. Burlington N. R.R. Co.*, 137 Or. App. 385, 389, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) ("The zone of danger is a location in which the plaintiff is at 'immediate risk of physical harm.'") (*quoting Gottshall*, 114 S. Ct. at 2406); *Vaillancourt v. Medical Ctr. Hosp., Inc.*, 139 Vt. 138, 143, 425 A.2d 92, 95 (1980) (denying recovery because no showing of threat of immediate injury); *Rodrigues v. State*, 52 Haw. 156, 170-71, 472 P.2d 509, 519 (1970) (noting that "the courts have been reluctant to award damages for mental distress unless it is accompanied by physical injury or the immediate threat of physical injury to the plaintiff"); *Falzone v. Busch*, 45 N.J. 557, 559, 214 A.2d 12, 17 (1965) (noting that the zone of danger test, then in force in New Jersey, limited recovery to situations in which "negligence causes fright from a reasonable fear of immediate personal injury"); *United States v. Hambleton*, 185 F.2d 564, 565 (9th Cir. 1950) (observing that Washington law required that "the act causing the mental fright or emotional distress also . . . threate[n] immediate bodily harm").

Other courts have expanded the scope of liability even further by adopting the so-called relative bystander rule, which allows a plaintiff to recover for emotional injuries sustained in witnessing injuries suffered by a close relative. *See generally Gottshall*, 114 S. Ct. at 2408. However, even the relative bystander rule does not dispose of the requirement that there be an injury or threat of imminent injury, it merely allows physical injury to a close relative to suffice. *See, e.g.*, *Simmons*, 543 Pa.

at 677, 674 A.2d at 238; *Thing v. La Chusa*, 771 P.2d 814, 829 (Cal. 1989) (en banc). In short, throughout the development of the tort of negligent infliction of emotional distress, an imminent threat of immediate physical harm to either the plaintiff or his proxy has remained a necessary element of recovery.

After surveying the law of negligent infliction of emotional distress, *Gottshall* adopted the zone of danger test as the appropriate benchmark. *See Gottshall*, 114 S. Ct. at 2410. In so doing, the Court limited recovery to plaintiffs "who are placed in immediate risk of physical harm." *Id.* at 2406. Lower courts applying *Gottshall* routinely have denied recovery to plaintiffs who were never in danger of suffering such imminent harm. *See, e.g., Bloom*, 41 F.3d at 911 (denying recovery under *Gottshall* because plaintiff "was neither placed in immediate risk of physical harm nor threatened imminently with physical impact"); *Marschand v. Norfolk & W. Rwy.*, 876 F. Supp. 1528, 1535 (N.D. Ind. 1995) (limiting recovery to damages caused by fear for plaintiff's safety), *aff'd*, 81 F.3d 714 (7th Cir. 1996); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (applying *Gottshall* and denying recovery because there was no showing of threat of immediate harm); *Garcia v. Burlington N. R.R. Co.*, 137 Or. App. 385, 389, 904 P.2d 1085, 1087 (Or. Ct. App. 1995) (denying recovery because plaintiff had never been "at 'immediate risk of physical harm'") (*quoting Gottshall*, 114 S. Ct. at 2406). As *Gottshall* concluded: "Railroad employees thus will be able to recover for injuries -- physical and emotional -- caused by negligent conduct of their employers that *threatens them imminently with physical impact*." *Id.* at 2411 (emphasis added). In short, although *Gottshall* recognized that liability for negligent infliction of emotional distress includes near misses as well as direct hits, *Gottshall* did not expand liability to include plaintiffs who were never at risk of suffering a direct hit.

2. Respondent Cannot Recover Because He Was Not in Imminent Danger of Suffering an Immediate Physical Injury.

Respondent cannot recover for his emotional injuries because he never endured any event with the potential for imminent calamity. In other words, respondent cannot recover because he never entered the zone of danger. Instead, respondent was exposed to a substance that, while posing no immediate danger, may create future complications and future physical injuries. It is possible, but by no means likely, that such exposure may eventually provide the basis for a tort action in which respondent can recover for both his physical and emotional injuries. But that exposure, standing alone, does not support an independent action for emotional distress under the zone of danger test adopted by *Gottshall*.

The Court of Appeals mistakenly allowed respondent to pursue his cause of action by disposing of *Gottshall*'s requirement that the plaintiff be "placed in immediate risk of physical harm." *Gottshall*, 114 S. Ct. at 2406. The Second Circuit divorced the phrase "physical impact" from its common law context and the context in which this Court used the phrase in *Gottshall*, and allowed respondent to pursue his claim because he had "physical impact with asbestos."[2] By viewing "physical impact" in a vacuum, the Second Circuit was able to convert exposure to asbestos into a sufficient impact to allow respondent to go forward with this action, notwithstanding that the asbestos did not pose any threat of immediate injury and

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[2] At the risk of parsing the Court of Appeals' opinion too finely, its choice of preposition seems significant. The Court of Appeals generally uses the somewhat awkward phrase "physical impact *with* asbestos," rather than the more natural "physical impact *from* asbestos." The reason for this preference is clear: There is no objective, clinical evidence of any physical injury, impact or effect *from* respondent's exposure to asbestos. There is only impact with, which is to say exposure to, asbestos. The common law, however, required more than mere exposure to something: It required a physical injury or impact *from* the defendant's conduct.

even though respondent was never in the zone of danger. This reasoning reflects a fundamental misunderstanding of *Gottshall* and, if left uncorrected, would result in a massive expansion of liability for negligent infliction of emotional distress.

By divorcing the physical impact test from the requirement that the plaintiff must be threatened with imminent injury, the Second Circuit has interpreted the physical impact test to be less demanding than the zone of danger test. That outcome gets it exactly backwards. As this Court recognized in *Gottshall*, the zone of danger test "was recognized as being a progressive rule of liability that was less restrictive than the physical impact test." *Gottshall*, 114 S. Ct. at 2410; *see also Waube v. Warrington*, 216 Wis. 603, 608, 258 N.W. 497, 499 (1935) (referring to the zone of danger test as "the liberal rule"). Indeed, this observation was critical to the Court's holding in that the "progressive" nature of the zone of danger test was held to be "more consistent than the physical impact test with FELA's broad remedial goals." *Gottshall*, 114 S. Ct. at 2410. *Gottshall*, therefore, makes it clear that the zone of danger test marks the outer boundaries of the tort of negligent infliction of emotional distress. As respondent was never placed in danger of immediate harm, he has no right to recovery under *Gottshall* despite his "impact" with asbestos.

The Court of Appeals' error may have stemmed from *Gottshall*'s expression of the zone of danger test as providing a cause of action for "'those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct.'" Pet. App. 17a (*quoting Gottshall*, 114 S. Ct. at 2406). The Court of Appeals may have placed undue weight on this Court's use of the disjunctive. However, when read in the context of this Court's understanding of the two tests and the historical evolution of the tort, it is clear that *Gottshall* used the phrase "physical impact" to describe an impact from conduct that posed an "immediate risk of physical harm." *Gottshall*, 114 S. Ct. at 2410.

The Court of Appeals' mistaken interpretation of "physical impact" is further underscored by the common law cases applying the physical impact test. Most courts that have retained the physical impact test continue to demand an actual physical injury. Impact short of injury does not suffice. *See, e.g., Grube*, 256 Kan. at 529, 886 P.2d at 852 (surveying cases); *Hammond v. Central Lane Communications Ctr.*, 312 Or. 17, 25, 816 P.2d 593, 597 (1991); *OB-GYN Assoc. v. Littleton*, 259 Ga. 663, 666, 386 S.E.2d 146, 149 (1989) (overruling *Christy Bros. Circus v. Turnage*, 38 Ga. App. 581, 144 S.E. 680 (1928)). Respondent's lack of any physical injury would doom his claim in these jurisdictions. To be sure, other courts demonstrated remarkable ingenuity in stretching the definition of "impact." But they did not dilute the physical impact test to the point at which exposure suffices. Rather, they demanded that the physical impact -- no matter how slight -- flow from conduct that posed a risk of imminent calamity. *See, e.g., Zelinsky v. Chimics*, 196 Pa. Super. 312, 175 A.2d 351 (1961) (treating minor jostling from low-speed collision as impact). The effect was to stretch the impact test to the point where it allowed recovery for the vast majority of near misses.[3]

The Court of Appeals' analysis not only reflects a misunderstanding of *Gottshall*, but also effects a substantial expansion of liability. The zone of danger test limits recovery to a particular kind of emotional distress: the emotional trauma caused by nearly suffering a physical calamity. As one common law court put it, not all fright is compensable, only

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[3] However, most of the States that initially diluted the physical impact test went on to adopt the zone of danger or relative bystander tests. "As courts increasingly adopted the zone of danger test, the need to stretch the definition of physical impact dissipated." *Bloom v. Consolidated Rail Corp.*, 41 F.3d 911, 916 n.6 (3d Cir. 1994). As a consequence, since *Gottshall* did adopt the zone of danger test, its use of the term physical impact should be interpreted in the traditional sense of actual injury. Otherwise, to employ both the no-matter-how-trivial version of the physical impact test and the zone of danger cases is to engage in double-counting, which could lead to a vast expansion of liability.

that "which arises from a reasonable fear of immediate personal injury to oneself." *Dulieu v. White & Sons*, 2 K.B. 669 (1901); *see also Grube*, 256 Kan. at 527, 886 P.2d at 851 (recovery under *Gottshall* limited to those who "suffer imminent apprehension of physical harm"); Pearson, 34 U. Fla. L. Rev. at 489. Physical impact, therefore, must be read as a physical impact from something that could cause an immediate injury. *See, e.g., Gottshall*, 114 S. Ct. at 2411. The Second Circuit divorced the "physical impact" test from the context of imminent threats. In so doing, it vastly expanded liability by allowing plaintiffs to recover for any emotional injury that is in any way associated with a physical impact.

Moreover, in light of the elasticity of the concept of "physical impact," the decision under review has the potential to open up liability for negligent infliction of emotional distress in almost any situation where the plaintiff can allege negligence. This would be directly contrary to the result reached in *Gottshall*. *Gottshall* recognized that the common law did not allow for the recovery of all types of negligently-inflicted emotional injury. Instead, the physical impact and zone of danger tests permitted a narrow class of plaintiffs to recover for a particular type of emotional distress. Outside these narrow "pockets of liability," the common law generally did not permit recovery. *See* Pearson, 34 U. Fla. L. Rev. at 513.[4] To expand liability to cover emotional distress caused by factors other than fear of immediate injury would throw open the floodgates that the Court carefully kept closed in *Gottshall*.

[4] The other "pockets of liability" were from negligent acts committed in the course of a pre-existing relationship that put the defendant on notice of the obvious potential for emotional distress. Pearson, 34 U. Fla. L. Rev. at 513. The handful of cases allowing recovery for the negligent mishandling of a corpse by an undertaker provide an example.

3. At Bottom, Respondent Seeks to Recover on a "Fear of Cancer" Claim That is Not Actionable Under *Gottshall*.

Respondent's claim is, in reality, a suit to recover damages for "fear of cancer." However, fear of cancer represents a fundamentally different kind of emotional distress than that recognized under the zone of danger test. The zone of danger test involves backward-looking anxiety stemming from a single event. Fear of cancer, by contrast, involves forward-looking anxiety about the uncertain possibility of developing a disease. As one court has explained, the zone of danger test allows recovery for "mental anguish engendered by a proven traumatic ordeal which did not result in physical injury," while a fear of cancer claim attempts to recover for "mental anguish arising from fear of future complications." *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (distinguishing fear of cancer cases and denying recovery for fear of cancer absent physical injury). Unlike the fright caused by nearly suffering an immediate physical injury, the fear of developing a potential future harm was not one of the "pockets of liability" for which recovery was allowed at common law. To the contrary, fear of cancer claims are still controversial in even the most progressive common law courts and were completely unknown to the common law at the time of FELA's passage in 1908. Therefore, in light of *Gottshall*'s focus on the common law at the time of FELA's passage, FELA should not be interpreted to include a "fear of cancer" tort.

Like the bystander rule rejected in *Gottshall*, a tort for emotional injury from the fear of cancer was not part of the common law at the time of FELA's enactment. Courts did not even begin to contemplate such a tort until the 1970's, and most continue to reject requests to create a "fear of cancer" tort. *See, e.g., O'Banion v. Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1013 (10th Cir. 1992) (observing that "there is no Oklahoma case law which addresses whether damages may be recovered for the fear of an increased risk of developing cancer

later in life," and rejecting such a claim as overly speculative); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 195 (Ky. 1994) ("[M]ere ingestion of a toxic substance does not constitute sufficient physical harm upon which to place a claim for damages."); *DeStories v. City of Phoenix*, 154 Ariz. 604, 744 P.2d 705 (Ariz. Ct. App. 1987) (no recovery for fear of cancer from exposure to asbestos dust). While some courts will allow fear of future cancer as an element of damages, they demand proof of an independent physical injury sufficient to give rise to an independent tort. *See, e.g., Marchica v. Long Island R.R. Co.*, 31 F.3d 1197 (2d Cir. 1994) (surveying fear of disease law and stressing importance of an independent physical injury), *cert. denied*, 115 S. Ct. 727 (1995); *Adams*, 783 F.2d at 593 (denying recovery in absence of "mental anguish caused by a physical injury proven to exist"); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985) (rejecting "a claim based on fear of future injury alone without accompanying asbestos-related physical injury"); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.) (denying recovery for asbestos-related injuries prior to any manifestation of bodily injury), *cert. denied*, 474 U.S. 864 (1985); *Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984) (no recovery without physical injury).[5] These courts' reluctance to establish an independent cause of action for fear of cancer is well-founded. As discussed in the following two sections, such a cause of action would create liability that is both unpredictable and virtually unlimited.

In the asbestos context, courts have refused to recognize a fear of cancer claim for plaintiffs who have experienced only

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[5] The Court of Appeals acknowledged these cases requiring an independent physical injury and attempted to bring this case within their scope by reiterating its finding of a "physical impact" from exposure. Pet. App. 21a-22a. This was clear error. In the context of fear of disease cases, the courts have not equated the physical injury requirement with physical impact, but have required a physical injury sufficient to bring an independent tort.

pleural thickening from exposure to asbestos. *See, e.g., Simmons v. Pacor Inc.*, 543 Pa. 664, 674, 674 A.2d 232, 237 (1996). Instead, courts have required, at a minimum, a showing that the plaintiff suffers asbestosis before permitting a recovery for fear of cancer. *See, e.g., Capital Holding Corp.*, 873 S.W.2d at 195. If this Court were to allow a fear of cancer claim for respondent, who has not even experienced pleural thickening (itself not a harmful condition), it would put itself well out in front of the States in this developing area of the law. Under these circumstances, there is no basis for allowing recovery for fear of cancer under FELA.

Finally, respondent's claim would fail even if it were brought in one of the few jurisdictions that have recognized fear of cancer actions. The States that have authorized such actions well recognize the potential for nearly limitless liability created by allowing fear of cancer suits in an age when seemingly everything causes cancer. Accordingly, those jurisdictions place demanding requirements on plaintiffs. For example, although the California Supreme Court has allowed plaintiffs to bring claims for negligent infliction of emotional distress to recover for fear of cancer, it permits such a recovery only if the plaintiff can show "by reasonable medical and scientific opinion, that it is *more likely than not* that cancer will develop in the future due to the toxic exposure." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 997, 863 P.2d 795, 816 (1993) (emphasis added). Here, respondent's own experts put his increased risk of cancer at between 1 and 5 percent.[6] It is crystal clear, therefore, that even in one of the few jurisdictions to recognize an independent tort for fear of cancer, respondent could not come remotely close to satisfying the threshold for bringing a cause of action.

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[6] One of respondent's own experts testified that the possibility that he will die from cancer increased by no more than between one and three percent. His other expert set the range at between one and five percent. *See* Pet. App. 3a-4a.

B. Respondent Remains Free to Bring a Claim Should He Ever Suffer an Actual Injury.

In *Gottshall*, this Court confronted the question of whether the plaintiffs could sue for negligently-inflicted emotional injuries. Each plaintiff's alleged emotional harm in the consolidated cases before the Court in *Gottshall* stemmed from a completed event. Therefore, the question in *Gottshall*, as in all cases in which the plaintiff alleges harm from a past traumatic event, was whether the plaintiffs could recover for the emotional distress associated with a specific incident, in other words, whether the plaintiffs had any cause of action arising out of the facts alleged in their complaints.

This case arises in a very different context. The question here is not *whether* respondent can sue, but *when*. There is no doubt that if respondent does, in fact, suffer a physical injury from his exposure to asbestos, he will be able to bring a cause of action to recover not only for his physical injuries, but also for any emotional injury. In that event, he will be compensated for all his injuries arising from his exposure. The only question for this Court is whether respondent should be allowed to sue now, before he has suffered any physical injury. As the Pennsylvania Supreme Court recently stressed, denying recovery for fear of cancer claims does not mean that the litigants "are left without a remedy for their mental anguish." *Simmons*, 543 Pa. at 678, 674 A.2d at 239. Respondent can bring an action "if cancer develops. It is in this action that [respondent] can assert [his] emotional distress or mental anguish claims." *Id.*

The equities here are quite different than those in *Gottshall*. If physical injuries do develop, then courts will be able to assess the true extent of the respondent's injuries -- physical and emotional -- with greater accuracy. *See id.* at 677, 238 ("The actual compensation due to the plaintiff can be more accurately assessed when the disease has manifested."). What is more, postponing recovery until respondent suffers a physical injury from the exposure has the benefit of eliminating

difficult questions about how such a federal rule would affect the accrual of injury for purposes of calculating the statute of limitations and how such a federal rule would coexist with state rules favoring a single recovery and prohibiting claim splitting.

C. "Compensating" Individuals Who Have Not Been Injured Subjects Defendants to Unlimited Liability and Jeopardizes the Ability of Courts and Insurers to Compensate Those Who Have Been Injured.

1. The Second Circuit's Ruling Creates Unprecedented and Unpredictable Liability.

The rule adopted by the Court of Appeals would allow individuals to receive compensation for the fear of future injury even though they have not yet suffered any concrete injury. This regime of automatic compensation upon exposure would bring to life "the specter of unlimited and unpredictable liability" that this Court interred in *Gottshall*. *Gottshall*, 114 S. Ct. at 2411. It has long been a bedrock principle of Anglo-American law that injury, *i.e.*, "*actual* loss or damage," is an essential element of a negligence claim. W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 30, at 165 (5th ed. 1984) (emphasis added); *see also* Restatement (Second) of Torts § 902 & cmt. a. Exposure to risk standing alone -- "[t]he threat of future harm, not yet realized" -- has never been thought sufficient to justify recovery. *Prosser and Keeton* § 30, at 165. And for good reason. Life is replete with low-level risks, including exposure to carcinogens, automobile accidents, occupational hazards, and recreational injuries. Although such exposures may increase the risk of some future injury, increased risk does not create an entitlement to automatic recovery for the discounted probability of future injury. Instead, a person exposed to a carcinogen because of another's negligence has the comfort of knowing that in the unlikely event that he develops cancer, the courts -- unencumbered by claims of those who have not suffered similar misfortune -- will ensure that he receives proper compensation. That right has always been thought sufficient,

and the law of negligence has developed accordingly. "Negligent conduct in itself is not such an interference with the interests of the world at large that there is any right to complain of it, or to be free from it, except in the case of some individual whose interests have suffered." *Id.*

This bedrock principle is reflected in the text of FELA. Although FELA was intended to expand the remedies provided by the common law of 1908 in some particulars, it does not charge employers with the duty to compensate workers for enhanced risk, any more than it makes "the employer the insurer of the safety of employees while they are on duty." *Ellis v. Union Pac. R.R. Co.*, 329 U.S. 649, 653 (1947). "FELA was intended to provide compensation for the injuries and deaths caused by the physical dangers of railroad work . . . ." *Gottshall*, 114 S. Ct. at 2410. This purpose is reflected in FELA's text, which authorizes suit by "any person *suffering injury*." § 51 (emphasis added). It does *not* permit suit by "any person *at risk of suffering injury*," or by "any person *who fears suffering injury*." In fact, Congress targeted railroad workers in enacting FELA *because* it recognized that railroad work was inherently risky. Once Congress acknowledged the risky nature of railroad work, it could have provided each employee with a lump sum payment reflecting the discounted probability of suffering an actual injury. Instead, Congress chose to have employers compensate only those employees for whom the increased risks were realized, *i.e.*, those "suffering injury." For these reasons, the recovery-upon-exposure rule adopted by the Court of Appeals is flatly inconsistent with both the common law and FELA.

What is more, the Second Circuit's ruling truly threatens to unleash unpredictable and unprecedented liability. As this Court recognized in *Gottshall*, courts have been acutely aware of the potential for runaway liability for alleged emotional damages. *See, e.g., Gottshall*, 114 S. Ct. at 2408. Wide recognition of claims for emotional distress creates the risk that such claims "'may inundate judicial resources with a flood of

relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act.'" *Id.* at 2405 (*quoting Maloney v. Conroy*, 208 Conn. 392, 397-98, 545 A.2d 1059, 1061 (1988)). These risks are particularly great with respect to fear of cancer claims. Exposure to carcinogens is simply a part of modern life. *See* Bruce N. Ames & Lois S. Gold, *Too Many Rodent Carcinogens*, 249 Science 970, 971 n.10 (1990) (observing that many common foods and beverages, including coffee, carrots and cauliflower have been found to cause cancer in laboratory experiments). In fact, the Second Circuit conceded that *asbestos* is present "in the air we breath each day." Pet. App. 20a. "Thus, all of us are potential fear of cancer plaintiffs, provided we are sufficiently aware of and worried about the possibility of developing cancer from exposure to or ingestion of a carcinogenic substance." *Potter*, 6 Cal. 4th at 991, 863 P.2d at 812.

Potential liability would prove unpredictable as well as breathtakingly vast. This Court has recognized that "[t]he incidence and severity of emotional injuries are also more difficult to predict than those of typical physical injuries . . . ." *Gottshall*, 114 S. Ct. at 2405. From any one event there are an "infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct." *Id.* at 2409. In addition, while courts are on firm ground in calculating the economic damages caused by physical injuries, they are considerably less well-equipped to estimate emotional damages, unaccompanied by physical injury, stemming from an enhanced possibility that the plaintiff may suffer a future injury.

Permitting recovery here, where negligent exposure caused perhaps no more than a one or two percent increase in the possibility that respondent will develop cancer, would produce two perverse results: (1) defendants would be subject to "infinite and unpredictable liability" far out of proportion to any risks they negligently caused, *Gottshall*, 114 S. Ct. at 2405,

and (2) some plaintiffs would recover handsome amounts even though there was never a significant possibility that they would develop *any* physical injury, much less cancer. *See Schweitzer*, 758 F.2d at 942 ("If mere exposure to asbestos were sufficient to give rise to a FELA cause of action, countless seemingly healthy . . . workers, workers who might never manifest injury, would have tort claims cognizable in federal court."); *Potter*, 6 Cal. 4th at 993; 863 P.2d at 813. This makes no sense. As the Third Circuit concluded, "[r]equiring manifest injury as a necessary element of an asbestos-related tort action" avoids problems with limitless liability and the compensation of those never injured, "and best serves the underlying purpose of tort law: the compensation of victims who have suffered." *Schweitzer*, 758 F.2d at 942.

The Court of Appeals recognized the dangers of unlimited liability but felt that the courts could limit the scope of liability by relying on the jury's determination of "whether the impact would cause fear in a reasonable person." Pet. App. 21a. The Court of Appeals elaborated: "To make this determination, a jury must take into account the nature of the toxic substance, its method of transmission into the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body." *Id.* This confidence in the jury's ability to identify reasonable claims is reminiscent of the Third Circuit's reasoning, which this Court rejected in *Gottshall*. The Third Circuit dismissed the zone of danger test as arbitrary, and expressed confidence in the ability of judges and juries to weed out frivolous claims and to provide compensation only for those emotional injuries that were reasonably foreseeable. *See Gottshall v. Consolidated Rail Corp.*, 988 F.2d 355, 371, 374-75 (3d Cir. 1993); *Carlisle v. Consolidated Rail Corp.*, 990 F.2d 90, 98 (3d Cir. 1993). This Court found such an approach "fatally flawed in a number of respects," including that "[s]uch a fact-specific test . . . would be bound to lead to haphazard results," and that it did not account for "the prospect that allowing such suits can

lead to unpredictable and nearly limitless liability for defendants." *Gottshall*, 114 S. Ct. at 2408-09.

2. Awarding Damages for Exposure Threatens the Ability of the Judicial System and the Insurance Industry to Compensate Those Who Suffer Actual Injury.

Such unlimited liability would make underwriting almost impossible and threaten the availability of insurance. The money to pay for fear of future injury must come from somewhere, and companies would pass on a substantial portion of that cost to their customers, in the form of higher prices, and to insurance companies, in requests for indemnification. Any pass-on of costs to insurance companies would hurt both those companies *and* society as a whole. Basic underwriting principles dictate that if insurers were responsible for fear of cancer claims, premiums would increase substantially. A typical company has an expected cost of future toxic tort liabilities based on its current experience and identifiable risks. If speculative fear of cancer claims were added to that cost, insurance companies would have to increase premiums to cover the increase in their expected liability. "Realistically the burden of payment of awards for [intangible harm] must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without any insurance." *Borer v. American Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977) (*en banc*).

Even more fundamentally, permitting recovery for fear of cancer would jeopardize the very availability of insurance for toxic torts. The speculative nature of fear of disease actions -- not just the limitless liability -- would make it extremely difficult for insurance companies to predict and underwrite risks. *Cf. Gottshall*, 114 S. Ct. at 2405. "[L]iability for fear of contracting disease and for medical monitoring expenses [is] . . . sufficiently open-ended to contribute to the uncertainty now troubling the insurance market." Kenneth S. Abraham,

Environmental Liability and the Limits of Insurance, 88 Colum. L. Rev. 942, 973 (1988). As the California Supreme Court recently concluded, "[s]hould [fear of cancer] liability continue to grow, and thereby lead to a substantial increase in toxic tort litigation, such liability insurance will become even more scarce and prohibitively expensive." *Potter*, 6 Cal. 4th at 991, 863 P.2d at 812 (*quoting* Willmore, *In Fear of Cancerphobia*, 3 Toxics L. Rptr. 559, 563 (1988) (second brackets in original)). Society at large, and injured tort victims in particular, would be far better served by a tort system that assessed liability in a more predictable manner. "[L]imiting the negligent actor's exposure [to suits by those who are physically injured] makes it possible to protect potential victims and the defendant through insurance or other risk-spreading mechanisms whose cost is more closely related to the risk . . ." *Thing v. La Chusa*, 771 P.2d 814, 826 (Cal. 1989) (*en banc*).

Allowing recovery for the emotional distress engendered by an increased risk of cancer would make the provision of insurance virtually impossible. Fundamental to any notion of providing insurance is that risks will be pooled and payments will be made to the unfortunate few who actually suffer the injury. *See* Keeton & Widiss, *Insurance Law* § 1.3, at 9 (1988). If exposure and the resulting increased risk of injury are sufficient to permit a claim, so that contingencies rather than events or injuries are compensated, then insurance cannot perform its function. If all increased risks had to be compensated immediately, it would become impossible to pool the risks. In effect, by allowing recovery upon a showing of increased risk, the courts are approximating the function of insurers, but are doing so with incalculably higher transaction costs, and in the case of FELA, without any statutory authorization.

Negligence law assures those who are subjected to an unreasonable risk of harm that *if* they sustain an injury, they will receive compensation. Insurance companies play a similar

role: They protect people who are at risk of suffering an injury by promising to compensate those who actually incur one. Courts and insurance companies do not, and can not, "compensate" all those who fear that they *might* suffer an injury in the future, irrespective of whether they *actually* do so. Our nation can ill-afford such coverage.

Finally, "compensating" those who have not been injured is an absurd misallocation of limited judicial and financial resources.

> It does not lie within the power of any judicial system to remedy all human wrongs. The obvious limitations upon the time of the courts, the difficulty in many cases of ascertaining the real facts or of providing any effective remedy, have meant that *there must be some selection of those more serious injuries which have the prior claim to redress* and are dealt with more easily.

Prosser and Keeton § 4, at 23 (emphasis added). Asbestos litigation long ago reached "crisis proportions," and it shows no signs of abating. *See Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985); *cf. Ahearn v. Fibreboard Corp. (In re Asbestos Litig.)*, 90 F.3d 963, 982, 984 (5th Cir. 1996) (finding that a "healthy company" was a limited fund for purposes of class certification because its asbestos liabilities would bankrupt it within five to nine years). Permitting suit by those who fear that they might be injured at an indefinite point in the distant future would divert resources -- both adjudicative and financial -- away from those who are actually injured and in need of compensation. That diversion is fundamentally at odds with a rational compensation system.

D. Respondent's Claim Fails for the Additional Reason That He Has Not Demonstrated Any Physical Manifestations of His Alleged Emotional Injuries.

As this Court noted in *Gottshall*, "[t]he common law consistently has sought to place limits on . . . potential liability [for negligently-inflicted emotional distress] by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover." 114 S. Ct. at 2408. The limits on who could sue explored in *Gottshall* were one, but far from the only, means of restricting liability for alleged emotional distress. Plaintiffs who fell squarely within the zone of danger still had to satisfy other prerequisites before they could bring a valid cause of action, including the requirement that their emotional injuries manifest themselves physically. *See, e.g.*, *Gottshall*, 114 S. Ct. at 2407 n.11. Even if (contrary to fact) respondent could satisfy *Gottshall*'s zone of danger test, his claim would founder on this independent requirement of the common law, which this Court should incorporate into FELA.

Historically, jurisdictions employing the zone of danger test further required a physical manifestation of the resulting emotional distress. Many jurisdictions continue to require such a physical manifestation. As this Court summarized, "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." *Gottshall*, 114 S. Ct. at 2407 n.11; *see, e.g., K.A.C. v. Benson*, 527 N.W.2d 553, 557 (Minn. 1995); *Towns v. Anderson*, 579 P.2d 1163, 1164-65 (Colo. 1978) (*en banc*); *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 410, 234 A.2d 656, 659-60 (1967); *see also* Restatement (Second) of Torts § 436A cmt. b ("emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern

itself with trifles."). The physical-manifestation requirement has long been recognized as an important protection against trivial or feigned claims. "Because emotional distress is highly subjective, often transient, and easily alleged, our tort law, in addition to a 'zone of danger' requirement, also requires physical manifestation of the distress as proof of the genuineness and gravity of the emotional suffering." *Garvis v. Employers Mut. Casualty Co.*, 497 N.W.2d 254, 257 n.3 (Minn. 1993). For this reason, some jurisdictions that have rejected the zone of danger test in favor of a broader "foreseeability" standard nonetheless continue to demand a physical manifestation. *See, e.g., Thorpe v. State*, 133 N.H. 299, 302, 575 A.2d 351, 353 (1990); *cf. Gottshall*, 114 S. Ct. at 2414-15, 2417 (Ginsburg, J., dissenting) (finding it "notable" that plaintiffs satisfied "the 'physical manifestation' test endorsed by the Restatement of Torts"). Without the physical manifestation requirement to assist courts in identifying meritorious claims for emotional distress, the game is not worth the candle.

> Although cases may arise in which the emotional distress absent physical harm may not be temporary or slight . . . , [w]e are unwilling . . . to impose upon the judicial system and potential defendants the burden of dealing with claims of damages for emotional distress that are trivial, evanescent, temporary, feigned, or imagined, in order to ensure that occasional claims of a more serious nature receive judicial resolution.

Amendola v. Kansas City So. Ry. Co., 699 F. Supp. 1401, 1410 (W.D. Mo. 1988) (*quoting Payton v. Abbott Labs.*, 437 N.E.2d 171, 180 (Mass. 1982)).

In light of its screening function, the physical-manifestation requirement is not merely a procedural nicety that is easily satisfied. Instead, a plaintiff must show significant, long-lasting illness. *See* Restatement (Second) of Torts § 436A cmt. c; *cf. Atchison, Topeka & Santa Fe Ry. Co.*

v. Buell, 480 U.S. 557, 570 n.18 (1987) ("One leading commentary states that '[i]n the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character.'") (*quoting Prosser & Keeton*, at 64).[7] Respondent has not come close to demonstrating serious physical symptoms. Rather, he alleges only that he feels "an appropriate degree of anger and concern" about his exposure. *See* Br. in Opp. 19. This will not suffice.

II. THIS COURT SHOULD NOT RECOGNIZE AN ACTION FOR MEDICAL MONITORING UNDER FELA.

The Court of Appeals further expanded potential liability by indicating that "medical monitoring costs are a reasonable basis for an award of damages in this case," even without any physical injury. Pet. App. 25a. The effect of this ruling was to recognize an independent cause of action for medical monitoring. But there is no support in the common law or FELA for such an action. The Second Circuit observed that "[i]t is hornbook law that a plaintiff may recover reasonable past and future medical expenses incurred *as a result of an injury*." Pet. App. 25a-26a (*quoting* Charles T. McCormick, *Handbook on the Law of Damages* § 90 (1935)) (emphasis added). That is true. But it hardly authorizes a court to award

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[7] Even jurisdictions that reject the "physical manifestation" test generally require a showing of injury sufficiently severe to be medically significant. *See, e.g., Aurora v. Burlington N. R.R.*, 31 F.3d 724, 725-26 (8th Cir. 1994) (noting that to permit a recovery, "a plaintiff's emotional distress must be 'so severe that no reasonable person could [be] expected to endure it. Furthermore, the emotional anguish or mental harm must be medically diagnosable and must be of sufficient severity that it is medically significant.'") (*quoting Parish v. Omaha Public Power Dist.*, 242 Neb. 731, 496 N.W.2d 914, 915 (1993) (brackets in original)); *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983); *see also Gottshall*, 114 S. Ct. at 2418 (Ginsburg, J., dissenting) (suggesting a requirement of "objective medical proof" of emotional injury). Respondent's alleged emotional injuries fail to meet even this relatively undemanding test.

such damages *without identifying any underlying injury*. By treating the need for medical monitoring as an injury in itself -- which is to say, a cause of action in itself -- the court vastly expanded FELA liability and sought to enact, by judicial fiat, a major reform in preventive health care insurance.

As the Second Circuit's own authority indicates, courts are not free to award damages in the absence of an actionable injury. *Accord* Restatement (Second) of Torts § 902 & cmt. a. Here, there simply is no injury. First, it is undisputed that respondent has not suffered a physical injury. Moreover, for all the reasons discussed above, he has not suffered a compensable emotional injury. But even if (contrary to fact) respondent had suffered an actionable emotional injury, the Court of Appeals' indication that medical monitoring should be available still would not make sense. The medical monitoring suggested by the Court of Appeals has nothing to do with respondent's purported emotional injuries. Respondent did not seek, and the Court of Appeals did not authorize, monitoring by psychiatrists to ensure that respondent did not develop further emotional distress from his fear of cancer. To the contrary, the Court of Appeals suggested that "Buckley should receive medical monitoring in order to ensure early detection and cure of any asbestos-related disease he develops." Pet. App. 28a. Presumably, what the Court of Appeals was really trying to remedy was respondent's exposure to asbestos. But FELA provides absolutely no basis for awarding medical monitoring to remedy an exposure (or an impact). FELA allows only those individuals "suffering injury" to bring a cause of action and recover damages.

Such a radical expansion of tort liability is especially inappropriate under FELA. First and foremost, it is wholly lacking in historical support. *See Cf. Susan L. Martin & Jonathan D. Martin, Tort Actions for Medical Monitoring: Warranted or Wasteful?* 20 Colum. J. Envtl. L. 121, 122-23 (1995). Claims for medical monitoring damages in the absence of a present injury were simply unheard of at the time of

FELA's enactment in 1908. Second, as this Court has made clear on more than one occasion, "FELA is not an insurance statute." *Gottshall*, 114 S. Ct. at 2409; *see also Ellis*, 329 U.S. at 653. In *Gottshall*, this Court rejected the foreseeability test proposed by the Third Circuit, in part because "the Third Circuit's ruling would tend to make railroads the insurers of the emotional well-being and mental health of their employees." *Gottshall*, 114 S. Ct. at 2409. But if FELA does not create an insurance policy for employees, it certainly cannot be interpreted to furnish them with an HMO. In sum, the Court of Appeals' decision to award medical monitoring damages to remedy exposure is fundamentally at odds with the modified common law system of recovery for negligently-caused injuries embodied in FELA.[8]

Moreover, in recognizing respondent's claim for medical monitoring, the Court of Appeals ignored not only the absence of any physical injury, but also the lack of any evidence of a significant increase in respondent's need for medical monitoring. The Court of Appeals emphasized that, in light of respondent's exposure to asbestos, he should receive regular medical check-ups to ensure early detection of cancer. While that is sound advice, it is applicable to almost everyone, whether or not they have been exposed to asbestos. In fact, the American Cancer Society recommends that *all* Americans over the age of 40 receive annual examinations for cancer. *See*

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[8] All of the policy objections to the creation of a fear of cancer tort apply with full force to the creation of an independent cause of action for medical monitoring. The unpredictable nature of liability under this novel cause of action would expand liability and create uncertainty that would make underwriting risks very difficult. *See* Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 Colum. L. Rev. 942, 973 (1988). What is more, "allowing individuals who have not suffered any demonstrable injury from such exposure to recover the costs of future medical monitoring in a civil action could potentially devastate the court system as well as defendants." *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D.W.V. 1990), *aff'd by* 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

American Cancer Society, *Summary of Current Guidelines for the Cancer-Related Checkup: Recommendations* (1987).

In addition, respondent's claim would fail even in those jurisdictions that have recognized claims for medical monitoring. Some courts that allow medical monitoring damages still require a showing of a substantial increase in the likelihood of contracting the disease. *See, e.g., Joy Mfg. Co.*, 755 F. Supp. at 1372. Such evidence is absent here. And even the courts that have been the most aggressive in awarding medical monitoring damages require a "showing that the need for monitoring is a reasonably certain consequence of the exposure . . . ." *Potter*, 6 Cal. 4th at 1006, 863 P.2d at 823. There is simply no basis for the courts to shift the costs of medical monitoring, that respondent should have borne in any event, onto respondent's employer.

Finally, even if such employer-financed medical monitoring is sound policy, such a policy innovation should come from Congress or the States. It should not come from the federal courts' interpretation of a statute enacted in 1908 that says not a word about medical monitoring. The wisdom of employer-financed health care is a hot topic for potential legislative reform across the nation. Congress did not anticipate that trend by ninety years with respect to the railroad industry. Congress and the States are free to impose the costs of medical monitoring on all employers on some equitable basis. But for the courts to impose those costs on a single company in a single industry solely because it caused a slight increase in the possibility that a plaintiff will suffer an injury in the distant future -- even though it has not caused a present tortious injury or even a probability of a future tortious injury -- is nothing short of judicial health care reform.

CONCLUSION

For the reasons discussed above, as well as those set forth in petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

CRAIG A. BERRINGTON
LAURA L. KERSEY
AMERICAN INSURANCE ASSOCIATION
1130 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 828-7100

KENNETH W. STARR
Counsel of Record
PAUL D. CLEMENT
DARYL JOSEFFER
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

Counsel for Amicus Curiae American Insurance Association

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